Supreme Court, U.S.
FILED

95 1671 FEB 26 1996

No.
OFFICE OF THE CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1995

MIRIAM SOFFER,

Petitioner,

vs.

QUEENS COLLEGE OF THE CITY
UNIVERSITY OF NEW YORK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

Miriam Soffer
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Apt. 3LL
New York, New York
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52 pp

QUESTIONS PRESENTED FOR REVIEW

Clerk of the Court of Appeals bestowed herself with judicial powers not granted her by Congress, and while violating Rules 26(b), and 27(b) of Federal Rules of Appellate Procedure acted on appellant's application to the Court. In violation of Court of Appeals Rule 0.18(7), which disallows the dismissal of appeal prior to the elapse of nine months of its docketing, the latter dismissed the appeal, citing non compliance with her illegal order.

Court of Appeals sanctioned its Clerk's illegal dismissal of the appeal by denying the application two months after its filing, without affording petitioner a hearing of oral arguments.

1. Did Court of Appeals denial order sanction its Clerk's illegal dismissal of the appeal, and did it further sanction the district court's contempt for due process demonstratedby its grant of defendant's re-noticed cross-motion, in violation of Court's Rules, to dismiss complaint when there was no motion to cross on the Court's calendar?

2. Should the Court of Appeals be instructed to void its order, which denied appellant the due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution, and to restore the appeal to the Court's calendar?

3. Should appellee be instructed to forthwith restore appellant to her job from which she was dismissed as a retaliatory measure?

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OPINIONS BELOW

The Court of Appeals for the Second Circuit of New York denial order of November 28, 1995, of certification of questions of law to the United States Supreme Court for instructions pursuant to 28 U.S.C., Section 1254(2) did not cite any reason for its denial, which was made without affording plaintiff a hearing of oral arguments. The order was entered on November 28, 1995 and is reprinted in Appendix A, 1a - 1b.

Clerk's October 4, 1990 unjurisdictional dismissal of the appeal made prior to the elapse of nine months of its docketing violated Second Circuit Rule 0.18(7). The order was entered on october 4, 1995 and it is reprinted in Appendix B, 3a -5a.

The district court's complaint's dismissal by Memorandum and Order of February 26, 1990 by Hon. Thomas C. Platt, Chief Judge cites the grant of Cross-Motion for Summary Judgment, while as can be learned from the docket entries there was no motion on the Court's calendar to cross. The Memorandum and Order (one document) was entered on February 27, 1990 and is reprinted in Appendix C, 6a-19a.

The Clerk's Judgment of February 28, 1990, which is based on Hon. Thomas C. Platt's Memorandum and Order of February 26, 1990 was entered on March 2, 1990 and is reprinted in Appendix D, 20a - 21a.

STATEMENT OF JURISDICTION

This petition seeks the review and the exercise of the United States Supreme Court supervisory powers over the November 28, 1995 denial order, made by the Court of Appeals for the Second Circuit of New York on motion to certify questions of law to the United States Supreme Court for instructions. The said order was entered on November 28, 1995.

Jurisdiction of this Court is invoked by 28 U.S.C. Section 1254(1); 28 U.S.C., Section 2106 and Supreme Court Rule 10 .1. (a).

CONSTITUTIONAL AMENDMENTS, FEDERAL RULES OF APPELLATE PROCEDURE; AND SECOND CIRCUIT RULES

(Full text is set forth in APPENDIX F pages 25a-28a)

UNITED STATES CONSTITUTION, AMENDMENT V

"No person shall ...be deprived of life, liberty or property without due process of law."

RULES OF APPELLATE PROCEDURE

26(b); 27(b); 27(c)

SECOND CIRCUIT RULES

0.18(7); 27(b); 34 a(2); (3)

INTRODUCTION

Miriam Soffer respectfully petitions for a writ of certiorari for the review of the order of the United States Court of Appeals for the Second Circuit of New York, entered in the above proceedings on November 28, 1995, and for the exercise of the supervisory powers of the United States Supreme Court over the Court of Appeals, which departed from the usual and accepted course of judicial proceedings by denying petitioner a hearing of oral arguments, which according to Court's Rule 27(b) is granted to "...any party desiring this...". And by refusing appellant such a hearing the court denied her due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution.

By the denial of appellant's application the Court sanctioned the unjurisdictional action, which the Clerk took on appellant's application to the Court for voiding the latter's previous order, and for extension of time to file brief and it further sanctioned Clerk's subsequent dismissal of the appeal for non compliance with her order, which was again made without jurisdiction, as the appeal was dismissed prior to the elapse of nine months of its docketing, in violation of Rule 0.18(7). The Court of Appeals further sanctioned the unjurisdictional dismissal of the complaint by the district court, Hon. Thomas C. Platt, whose contempt for due process has been demonstrated by the

grant of defendant's re-noticed cross-motion for summary judgment, in violation of Court's Rule, which asserts that motions off the Court's calendar shall not be restored by consent or stipulation. The docket entries and the transcript of the court's proceedings manifest the latter's knowledge that there was no motion to cross on the Court's calendar.

STATEMENT OF THE CASE

This case presents the issue of undue process and unequal protection of the laws that petitioner, appellant in the Court of Appeals, plaintiff in the Eastern District Court of New York, encountered while attempting to litigate judicial proceedings against Queens College of the City University of New York. The above referenced violations of appellant plaintiff's constitutional rights under the Fifth Amendment to the United States Constitution resulted from usurpation of office of the State Attorney General by his assistant attorneys, who represented the defendant, appellee in the Eastern District court, and in the Court of Appeals. The above referenced attorneys conspired with other Officers of the Courts for the purpose of causing the premature termination without adjudication of petitioner-appellant-plaintiff's judicial proceedings.

Evidence of the above referenced conspiracy and interference in the prosecution of appellant's legal proceedings has been documented in Court papers.

PROCEEDINGS AND NON PROCEEDINGS IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT OF NEW YORK

Appellant's Fifth Amendment rights to due process and equal protection of the laws were violated by the Clerk, who notwithstanding the appeal's docketing after the first Monday in April, violated Second Circuit Rule 34(a)(2); (3), and scheduled the appeal for the same term. As appellant moved the Court for vacation of Clerk's unjurisdictional order, the latter assumed judicial powers not granted her by Congress and acted upon the motion, while continuing to violate the above referenced Rule. The said violations were made on behalf of the Clerk by Supervisory Staff Attorney, Catherine J. Minuse. The Clerk also conspired with assistant attorney general Marilyn T. Trautfield, who was never attorney of record to the appellee. However, that fact did not prevent her from filing an affidavit in opposition to appellant's motion to the Court for extension of time to file brief, as the record on appeal was accepted by the Clerk in an incomplete state. The above referenced assistant attorney general misrepresented herself in her sworn affidavit as the appellee's attorney. The latter ignored the fact that the Clerk should have originally scheduled the appeal, which was docketed after the first Monday in April for the following term of the Court, and she demanded that the Clerk dismiss the appeal. The Clerk falsely entered Ms. Marilyn T. Trautfield's affidavit as appellee's affidavit. And the Clerk by her deputy Mario Giscome granted

Ms. Trautfield's application, made without standing, for dismissing the appeal, notwithstanding Second Circuit Rule 0.18(7), which disallows the Clerk to dismiss an appeal prior to the elapse of nine months of its docketing for non submission of brief.

Attempting to restore her appeal to the Court's calendar, appellant moved the Court on September 29, 1995 for certification of questions of law to the United States Supreme Court for instructions pursuant to 28 U.S.C., Section 1254(2). The motion was denied on November 28, 1995 by an order, defective in law and in form. A panel of judges of the court of appeals denied the motion in a secretive manner, two months after its filing, without affording appellant the hearing of oral arguments the Court grants to all litigants similarly situated. The Judges printed names do not appear under the signatures.

PROCEEDINGS AND NON PROCEEDINGS IN THE EASTERN DISTRICT COURT OF NEW YORK

BACKGROUND

Petitioner, Miriam Soffer, appellant in the Court of Appeals, plaintiff in the Eastern District Court of New York, a full time faculty member of the department of Classical and Oriental Languages at Queens College of the City University of New York since Fall 1969, was denied her property rights to vested workloads established by the Collective Bargaining Agreement of 1971 - 1972 between the University and the representative Union. Petitioner was required to increase productivity over

that demanded of her departmental male counterparts. The increased workloads, which were sometimes 100% higher than those required from other departmental faculty members benefited undeserving departmental faculty members, whose teachingloads were decreased to almost non existing ones at petitioner's expense.

Defendant's violations of plaintiff's property rights under the Fifth Amendment to the United States Constitution to workloads established by the Collective Bargaining Agreement of 1971-1972 between the University and the representative Union, caused the filing of a complaint on May 26, 1987, in the Eastern District Court of New York (district court). The complaint is citing violations of Title VII, the Equal Pay Act, 42 U.S.C., Section 1981 et seq., and several other state laws.

Defendant continued its violations of plaintiff's constitutional rights during the pendency of court proceedings, which caused plaintiff to move the district court, Hon. Thomas C. Platt, Chief Judge, (Hon. Platt) for a Preliminary Injunction (PI) and for a Temporary Restraining order (TRO), instructing the defendant to equalize her workload assignment for the Spring semester of 1988 with those assigned to her departmental male counterparts. Upon defendant's counsel assertion that there were insufficient data for determination of the matter, Hon. Platt ordered that additional affidavits be submitted by February 12, 1988. Notwithstanding the fact that plaintiff wrote Hon. Platt to inform him that Queens College affiant Ms. Lola Locker's affidavit was not made from personal

knowledge, and was filled with misrepresentation of facts, and notwithstanding the latter's written admission to numerous "mistakes" made in her affidavit, Hon. Platt decided the motion on the basis of the misrepresenting affidavit, without affording plaintiff cross examination of the affiant in Court. Hon. Platt's decision was made on April 7, 1988, more than two months after the filing of the motion.

On December 12, 1988 plaintiff filed two motions for summary judgment. One sought an order for salary backpay in the sum of $15.241.00, that resulted from defendant's lockout of plaintiff from her job during the Spring semester of 1984. The motion also sought punitive damages. The second motion was for summary judgment pursuant to Rule 56(g) of FRCP. Upon realizing that she cannot continue with the litigation of the motion as no discovery has been made by defendant, plaintiff sought the same on December 16, 1988. The defendant made a mockery of the discovery process by letting plaintiff examine unauthenticated copies of documents under the supervision of a clerical employee of the attorney general's office. Plaintiff's complaints to Magistrate A. Simon Chrein (Mag. Chrein) were never responded to. However, the latter responded to Ms. Marilyn T. Trautfield's letters in the matter, notwithstanding his knowledge that the latter was not defendant's attorney of record. Furthermore, Mag. Chrein made several ex parte orders, in violation of Federal Rules of Civil Procedure (FRCP) and Court's Rules, which disallow such practices. Upon appealing on a short

appeal, which disallows oral arguments, to Hon. Platt, no response was received by plaintiff. A subsequent examination of the file disclosed that the latter asserted in writing that:

"I have no opinion."

On September 14, 1989 plaintiff attempted to move the Court by Order to Show Cause. Plaintiff was not allowed to bring herself the motion to the Magistrate on Duty, Magistrate Caden. Instead, a clerk in the Clerk's office assured her that he would bring it before the Magistrate. Plaintiff was later informed by that clerk that her motion was denied!

On September 27, 1989 the Clerk entered defendant's Notice of Motion for an Order enjoining plaintiff from bringing any further motions for TRO and for injunctive relief. The motion was made returnable on October 6, 1989. No entry was made on the docket of serving plaintiff with the motion's papers. And indeed it was admitted by letter dated October 6, 1989, which assistant attorney general Marilyn T. Trautfield wrote to Hon. Platt, that the motion papers were never served upon plaintiff. The said letter was written after Hon. Platt held earlier in the day of October 6, 1989 an ex parte proceeding. The transcript of the October 6, 1989 proceedings before Hon. Platt shows that the latter asked Ms. Trautfield whether she was defendant's attorney, to which Ms. Trautfield responded affirmatively, notwithstanding the fact that the docket entries listed Ms. Nancy Miller Lerner as defendant's attorney of record. Hon.

Platt never bothered to ask Ms. Trautfield whether she served the motion papers upon plaintiff.

Ms. Trautfield wrote to Hon. Platt:
"...I am reserving these papers on the plaintiff and am renoticing this motion for 11/17/89. In addition, at your Honor's direction, I am also renoticing deft's cross-motion for summary judgment for 11/17/89.

On November 13, 1989 plaintiff withdrew both of her motions for summary judgment, which were filed on December 12, 1988. The said withdrawals have been entered on the docket under Nos. 53 and 54 respectively. The last page of the docket entries is reprinted in Appendix E page 22a.

Notwithstanding Hon. Platt's knowledge of the withdrawal of appellant's motions, the latter allowed defendant's counsel to proceed with her re-noticed cross - motion. The Chief Judge's contempt for due process has been demonstrated in the transcript of the proceedings of November 17, 1989, which Hon. Platt conducted on that day, while he instructed the plaintiff to sit down, and thus she could hardly hear the conversation between Ms. Nancy Miller Lerner the Chief Judge.*

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* Quoting from the transcript:

THE COURT: Ms. Soffer tendered a withdrawal of the motion. You have a cross motion for and injunction but there is nothing to enjoin because she has withdrawn her motion.

Plaintiff advised Hon. Platt that discovery was not completed, that her complaints to Magistrate Chrein were not responded to, and that her complaints to Hon. Platt were not responded to either. Plaintiff further advised Hon. Platt that she withdrew her motions for summary judgment because she believed that a trial must be conducted on the merits. Plaintiff also advised Hon. Platt that he lacked jurisdiction over the parties since she did not have a chance to correct her mistake of naming merely Queens College of the City University as the defendant, rather than the Board of Trustees of the City University of New York. All the above referenced reasons did not impress Hon. Platt, who on February 26, 1990 rendered a Memorandum and Order dismissing the complaint. The said Memorandum and Order, which Hon. Platt made in excess jurisdiction is also filled with factual mistakes. One of them asserted contrary to the facts, that plaintiff handed her withdrawal of her motion to the Judge in the Courtroom on November 17, 1989. Notwithstanding Hon. Platt's assertion, plaintiff withdrew her motions four (4) days earlier, on November 13, 1989, a fact, which is documented in the docket entries of that date under Nos. 53 and 54 respectively. See Appendix E page 22a.

MS. LERNER: There are two motions returnable. One is a cross motion for summary judgment.

THE COURT: I understand you want to pursue that.

MS. LERNER: Yes.

As a consequence of the undue process and unequal protection of the laws plaintiff encountered in the district court, she appealed Hon. Platt's complaint's dismissal made in excess of the Chief Judge's jurisdiction.

REASONS FOR GRANTING THE WRIT

The Court of Appeals departed from the usual and accepted course of judicial proceedings by denying appellant's motion in the following manner:

1. Instead of hearing appellant's argument on October 10, 1995, as sought by her September 29, 1995 application to the Court, the motion was denied by a panel of judges of the Court on November 28, 1995; and

2. by failure to publish the November 28, 1995 date set for the determination of the motion in the New York Law Journal, as practiced by this court; and

3. by failure to inform appellant of the November 28, 1995 date of the said denial order, a procedure that prevails in the Court of appeals according to information obtained by appellant in person, and through telephone conversations with Clerk's deputies; and

4. by reaching the decision in a secretive manner as no specific time or place for making the decision was ever published, and it is further unclear as to when, where and how did the panel of judges of the Court of Appeals reach its decision, considering that the Judges time is sparingly allotted; and

5. by denying the motion two months after its filing in the Court of Appeals; and

6. by refusing to hear appellant's oral arguments notwithstanding Court of Appeals Rule 27(b) assertion that:

"...the Court will hear oral argument from any party desiring this..." ; and

7. by denying appellant a hearing of oral arguments the Court grants to all litigants similarly situated it denied her constitutional rights to due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution; and

8. by its denial of appellant's motion the Court sanctioned its clerk's unjurisdictional denial of appellant's application to the Court for voiding the latter's previous order made without jurisdiction, in violation of Rule 26(b) of Federal Rules of Appellate Procedure, and for extension of time to file brief; and

9. Court of Appeals also sanctioned its Clerk's conspiracy with Ms. Marilyn T. Trautfield, an assistant attorney general, though never appellee's attorney of record, by accepting the latter's affidavit in opposition to appellant's application to the Court for extension of time and for voiding Clerk's previous order made without jurisdiction, and it further sanctioned the false entry of the said affidavit as appellee's affidavit; and

10. Court of Appeals further sanctioned the conspiracy between the above

referenced officers of the Court, which intended to cause the premature termination of the appeal without its adjudication by its Clerk's dismissal of the appeal based on appellant's non compliance with the unjurisdictional scheduling order; and

11. Court of Appeals further sanctioned the Clerk's unjurisdictional appeal's dismissal prior to the elapse of nine months of its docketing, in violation of Second Circuit Rule 0.18(7); and

12. Court of Appeals sanctioned Hon. Platt's contempt for due process, as the former Chief Judge dismissed the Complaint by granting defendant's re-noticed cross-motion, in violation of Court's Rules, when no motion to cross was on his calendar; and

13. Not only is the Court of Appeals order defective in law, but it is also defective in form, as it lacks the panel of judges printed names under their signatures.

POINT I

COURT OF APPEALS REFUSAL TO HEAR APPELLANT'S ORAL ARGUMENTS, WHICH IT GRANTS TO : "...ANY PARTY DESIRING THIS...", DEEMS VOID ITS DENIAL OF THE APPLICATION, AS IT DENIED APPELLANT THE DUE PROCESS AND THE EQUAL PROTECTION OF THE LAWS GUARANTEED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Fifth Amendment to the United States Constitution guarantees that:

" No person shall be... deprived of life, liberty, or property without due process of law..."

It appears that Court of Appeals for the Second Circuit deprived appellant of due process. Appellant's application to certify questions of law to the United States Supreme Court for instructions, was denied two months after its filing, without affording her the hearing of oral arguments, notwithstanding Court of Appeals Rule 27(b). By refusal to grant appellant the hearing of oral arguments the Court grants to all litigants similarly situated the Court also denied appellant her constitutional rights to due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution. The denial order is therefore void and should be declared so by the Court.

POINT II

COURT OF APPEALS SHOULD BE INSTRUCTED TO FORTHWITH RESTORE THE APPEAL TO THE CALENDAR, AS ITS DISMISSAL, BY CLERK LACKING JURISDICTION, IS VOID

The Court of Appeals should be instructed to restore the appeal to the calendar, as it has been dismissed prior to the elapse of nine months of its docketing, in violation of Rule 0.18(7). The above referenced order cited default in compliance with Clerk's order, when the Clerk had no jurisdiction to make an order on appellant's application to the Court for voiding her previous order.

It appears that the Court of Appeals sanctioned both its Clerk's unjurisdictional order and the district

court, Hon. Thomas C. Platt's contempt for due process, which was demonstrated by the Judge's grant of defendant's re-noticed cross motion for summary judgment for the dismissal of the complaint, when no motion to cross was on the Judge's calendar.

It has been established by Court's ruling in :

TRIAD ENERGY CORP., v. THOMAS McNELL, 110 F.R.D. 382, 385 (S.D.N.Y. 1986)

that : "A "void" judgment is one where, e.g. the Court lacked personal or subject matter jurisdiction, or entry of the order violated due process..."

As undue process occurred during the litigation of the above entitled proceeding, where all the applicable laws and rules have been violated, and the evidence has been documented in Court's papers, all the above referenced orders, which have been made without jurisdiction of their makers should be forthwith declared void, and the appeal should be forthwith restored to the Court's calendar.

Furthermore, an attack on void orders, which did not result from mistakes but rather from a willful conspiracy to deny petitioner her day in Court is not subject to:

"Reasonable time" limit in rule allowing default judgment to be set aside was not applicable to motion attacking judgment as void. Fed. Rules Civ. Proc. Rule 60(b)(4) 28 U.S.C.A."

TRIAD ENERGY CORP. v. THOMAS McNELL, 110 F.R.D. 382, (S.D.N.Y. 1986)

POINT III

RESPONDENT, QUEENS COLLEGE OF THE CITY UNIVERSITY OF NEW YORK, SHOULD BE ORDERED TO FORTHWITH RESTORE PETITIONER TO HER JOB FROM WHICH SHE WAS DISMISSED AS A RETALIATORY MEASURE DURING THE PENDENCY OF COURT PROCEEDINGS

Respondent, Queens College of the City University of New York, should be ordered to forthwith restore petitioner to her job from which she was dismissed as a retaliatory measure during the pendency of Court proceedings. Respondent-appellee-defendant's conspiracy with other Officers of the Court to deny petitioner her day in court is evidenced in the unjruisdcitional orders of the district court and of the Court of Appeals. Considering that the said orders are void, respondent cannot regard them as final ones, and thus cannot claim that petitioner was dismissed after the conclusion of the above entitled proceedings in Court. Furthermore, respondent and its attorneys are very well aware of the law, which forbids retaliatory acts by employer for filing complaints of civil rights violations in the Federal Courts. Respondent should therefore be ordered to forthwith restore petitioner to her job with all its due benefits.

CONCLUSION

Respondent, Queens College of the City University of New York, by its attorneys representing the State Attorney General, conspired with Officers of the respective Courts for the purpose of causing the premature termination without adjudication of petitioner's judicial proceedings.

It appears that the above referenced Officers of the Courts violated their oath of office to protect the United States Constitution, as demonstrated by their contempt for petitioner's constitutional rights to due process and equal protection of the laws guaranteed by the Fifth Amendment to the United States Constitution.

Consequently, unless and until this Court grants a Writ of Certiorari the travesties of the judicial proceedings, and their terminations by illegal orders will prevail.

Should the above referenced illegal orders, made without jurisdiction of any of their makers, continue to prevail as res judicata ?

For the foregoing reasons the petition for writ of certiorari should be granted.

Dated: February 26, 1996

Respectfully submitted

Miriam Soffer
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10019
(212) - 5866535

APPENDIX A

ORDER OF WHICH REVIEW IS SOUGHT
89-CV-1695
Platt, J.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse, Foley Square, in the City of New York, on the 28th day of November one thousand nine hundred and ninty five,

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Miriam Soffer,

Plaintiff-Appellant,

V.

Queens College of the City University of New York,

Defendant-Appellee.

United States Court of Appeals
Filed
Nov 28 1995
George Lange III, Clerk
Second Circuit

90-7324

A motion having been made to certify questions to the United States Supreme Court pursuant to 28 U.S.C., Section 1254(2), said motion hereby is denied.

JMW DGJ FIP

/s/ J. M. Walker

Undeciphered signature

Undeciphered signature

Circuit Judges

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK 10007

ELAINE B. GOLDSMITH
Clerk

MANDATE

UNITED STATES COURT OF APPEALS
FILED
OCT 4 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appels for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fourth day of October, one thousand nine hundred and ninty.

SOFFER

V.

QUEENS COLLEGE

U.S. COURT OF APPEALS

DOCKET NUMBER:
90-7324

U.S. DISTRICT COURT
and
DOCKET NUMBER
EDNY

87-CV-1695

PLATT (0720)

A scheduling order in accordance with Civil Appeals Management Plan of this Court having been entered therein, requiring the record on appeal, the appellant's brief and joint appendix to be filed on or before the dates stated on the scheduling, and also providing that in the event of default by the appellant the appeal shall be dismissed forthwith and it appearing that appellant has so defaulted,

Upon consideration of the appeal it is

ORDERED that the appeal be, and it hereby is dismissed.

ELAINE B. GOLDSMITH
Clerk
By

/s/ **Mario Giscome**

Deputy Clerk, USCA

PLEASE REFER TO THIS COURT'S DOCKET NUMBER IN ALL MATTERS

A TRUE COPY
ELAINE B. GOLDSMITH
Clerk

Certified: Oct 5, 1990

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MIRIAM SOFFER,

Plaintiff,

-against-

QUEENS COLLEGE OF THE CITY UNIVERSITY OF NEW YORK,

Defendant.

----------X

87 CV 1695

MEMORANDUM AND ORDER

Platt, Chief Judge.

Plaintiff Miriam Soffer, a lecturer at Queens College, filed her pro se complaint on May 27, 1987. The complaint alleges that defendants Queens College, her employer, discriminated against her on the basis of sex. According to the complaint, defendant arbitrarily demanded greater productivity from plaintiff than her male counterparts in the department of Classical and Oriental Languages during the Spring 1984, Fall 1984, Fall 1985, and Fall 1987 semesters; according to plaintiff, she is required to teach between 33% and 100% more that her male counterparts. It also alleges that defendants

discriminatorily "locked out" plaintiff during the Spring of 1984 semester. 1.

In December 1988, plaintiff moved pursuant to Federal Rule Civil Procedure 56, for summary judgment. In January, 1989, defendant cross-moved for summary judgment.

In September, 1989, defendant moved to enjoin plaintiff (who seems to begin each semester by bringing a motion for a

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1. The complaint makes no reference to plaintiff being inadequately compensated. Thus, despite the fact she did raise such a claim before the Equal Employment Opportunity Commission, plaintiff's complaint may not be said to allege a claim under the Equal Pay Act. See Berry v. Board of Supervisors of L.S.U., 715 F. 2d 971 (5th Cir. 1983). Moreover, plaintiff receives the highest allowable salary of any lecturer and thus no male lecturer is paid more than she is. Since plaintiff has produced no evidence showing that she meets the requirement of having obtained a Phd or its equivalent and thus ineligible for a position above lecturer, she is unable to maintain an unequal pay claim.

temporary restraining order which would lessen her teaching load that semester) from filing additional motions for temporary restraining orders. In October 6, 1989, defendant argued that motion. Plaintiff failed to appear and had filed no opposition papers. At that time, we denied defendant's motion to enjoin plaintiff from filing any more TROs since we had no way of knowing whether plaintiff's future motion papers would allege different facts which might entitle her to a TRO; however, we ruled that if plaintiff should bring a motion for a future TRO which substantially reiterates an earlier motion with no distinguishing features, then defendant would be entitled to sanctions which would double with each such motion, i.e., $500 for the first such motion, $1000 for the second, $2000 for the third. This Court also required that defendant re-notice its January, 1989 cross motion for summary judgment.

Shortly there after (spelling appears in the original), defendant communicated to this Court that because

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Equal Pay Act. See Berry v. Board of Supervisors of L.S.U., 715 F. 2d 971 (5th Cir. 1983). Moreover, plaintiff receives the highest allowable salary of any lecturer and thus no male lecturer is paid more than she is.

of a clerical error its October 6 motion papers were sent to the wrong address. Defendant re-noticed both its motion to enjoin plaintiff from filing further TROs and its cross-motion for summary judgment for November 17, 1989.

Plaintiff never submitted any opposition papers to these motions. On November 13, 1989, plaintiff filed a "Withdrawal of motion for Summary Judgment Pursuant to Rules 56(g) of Fed. R..Civ.P." Among the reasons plaintiff set forth for withdrawal of the motion was that " a dispute of material facts requires judgment by trial on the merits." 2. Plaintiff was

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2. The reasons set forth by plaintiff were "(a) the above defendant Queens College of the City University of New York has been inadvertently named as a defendant; (b) since the above complaint was filed against Queens College of the City University of New York, the defense papers should have been submitted by the Board of Trustees of the City University, that is the sole body with statutory powers and duties of governing all the educational units thereof; (c) contrary to defendants papers dated September 22, 1989 received on October 21, 1989, Right to Sue Notice in Equal Employment Opportunity Commission charge No. 160-87-1474, was issued on June 12, 1989 by the United States Department of Justice and was received by plaintiff on June 19 1989; (the above notice lists as addressed 1. Queens College of the City

was informed by defendant that it would go forward with its summary judgment motion. On November 17, 1989, both defendant by its attorneys and plaintiff pro se appeared. Defendant argued its motion; plaintiff argued in opposition and then handed up the withdrawal of her own motion, which was so ordered by this Court. In her argument, plaintiff maintained that she had not been permitted discovery and that the fact she brought this suit within ninety days of receiving a Right to Sue notice prevents dismissal.

Defendants's Motion to Enjoin Plaintiff

With regard to defendant's motion to enjoin plaintiff from filing any more TROs, this Court sees no reason to alter its ruling of October 6, 1989. Plaintiff's lack of opposition does not change this Court's view that subsequent motion for a TRO might be based on different facts and thus filing of such

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University of New York, and 2. the EEOC; (e) based on the above Right to Sue Notice, an action has been filed in the Court; (f) the above action has been filed pursuant to Court Rules in this Court, although jurisdiction and venue are invoked in the Southern District Court of New York; (g) the above named defendant refused to produce documents, thus, no meaningful discovery has been made; and (h) dispute of material facts requires judgment by trial on the merits."

future motions may not be enjoined. However, in light of plaintiff's actions, this Court also finds that sanctions are appropriate and should plaintiff bring a motion for a future TRO which substantially reiterates with no distinguishing features an earlier motion. In such a case, defendant will be entitled to $500 in sanctions which will double with each successive frivilous (spelling copied from the original) motion, i.e. $500 for the first such motion, $1000 for the second, $2000 for the third.

Defendant's Cross Motion for Summary Judgment

While leeway must be accorded pro se parties, "at some point in a lawsuit even pro se litigants must make clear to the court their claims and the facts that they believe entitle them to specific relief." Salahuddin v. Coughlin, 781 F.2d 24, 29 (2d Cir. 1986). Here, despite plaintiff's claims that "no meaningful discovery had taken place," discovery had been ongoing since January, 1989, during which time defendant had made 108 documents requested by plaintiff available while plaintiff had refused to answer defendants's interrogatories, 3., when U.S. Magistrate John Caden ruled there would be no further discovery

3. It should be noted that the Second Circuit recently approved dismissal of a pro se party's case for failure to comply with discovery requests. Manatee v. Lensink, 87-7619 (2d Cir. 1990).

extensions beyond September 1, 1989. Further, with respect to the present motion, plaintiff had been specifically advised in writing that:

> You may not simply rely upon your complaint, but you must respond by affidavits...setting forth specific facts showing that there is a genuine issue of material fact for trial. Any factual assertions in [defendant's] affidavits will be accepted as true unless you submit affidavits or other contradictory evidence contradicting our assertions. If you do not respond, summary judgment, if appropriate may be entered against you. If summary judgment is granted against you, your case will be dismissed and there will be no trial.

Thus, it seems appropriate that despite plaintiff proceeding pro se, plaintiff should be subject to the strictures of summary judgment which require affidavits and exhibits rather than mere unsupported allegations to defeat defendant's summary judgment motion. 4. See Hanlin v. Mitchelson, 794 F. 2d 834, 839 (2d Cir. 1986).

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4. Defendant maintains that summary judgment should be granted because plaintiff has failed to submit a Rule 3(g) statement and because the affidavits submitted were in support of her own summary judgment motion; however, in light of the fact plaintiff is proceeding pro se, this Court will not grant summary judgment for defendant on these grounds.

While plaintiff's only responses to defendant's motion were those statements made during oral argument, plaintiff did file two personal affidavits and 24 exhibits with her own summary judgment motion which was withdrawn on November 17, 1989. Since plaintiff is proceeding pro se, this Court examined those affidavits and exhibits to determine if plaintiff had set forth any specific facts showing that a genuine issue or material fact existed for trial.

Those affidavits and exhibits set forth no fact which indicates that plaintiff's EEOC complaint which stated that the alleged discrimination took place during September, 1985 and afterward is somehow incorrect. Since no action based on a claim of discrimination may be brought in federal court unless the claim was properly brought before Equal Employment Opportunity Commission, this Court does not have subject jurisdiction over any Title VII claim prior to September, 1985 because plaintiff's EEOC complaint upon which her Right to Sue Notice is based, alleges that the discrimination occurred no earlier than September 1985. See Miller v. Intern. Tel & Tel Corp., 755 F.2d 20 (2d Cir. 1985). Therefore, plaintiff's claim based on being locked out during the Spring, 1984 semester, discriminatorily required to work more than her male counterpart during the Spring and Fall 1984 semesters are

dismissed as a matter of law. 5.

Similarly, there is no jurisdictional predicate for those claims after February, 1987. Since plaintiff's Right to Sue notice was issued on February 27, 1987, any claim based on discrimination subsequent to that could not have been properly before the EEOC. See id. Plaintiff's affidavits and exhibits indicate that plaintiff has in fact filed a second EEOC complaint apparently involving discrimination which allegedly

took place at this later date, she is in receipt of a Right to Sue Notice, and has filed a second suit in the Eastern District of New York. 6. Therefore, plaintiff's claim based on discriminatory workload during the Fall of 1987 semester must be dismissed.

Plaintiff's only remaining claim is that she was discriminatorily required to carry a greater workload than her male counterparts during the Fall, 1985 semester. Defendant maintains that it is Plaintiff is also precluded from seeking relief from actions which took place during the Spring of 1984 because she took part in the Melani v. Board of Higher Education of the City University of New York, 73 Civ. 5334, consent decree and thus waived her rights to pursue any action based on defendant's action prior to the effective date of the decree, i.e., September 10, 1984.

entitled to summary judgment because plaintiff has failed to set forth any specific facts by way of affidavits or exhibits from which it may be inferred that defendant, her employer, treated her less favorably than other employees because of her gender. See Montana v. First Federal Savings and Loan Association of Rochester, 869 F 2d 100, 104 (2d Cir. 1989).

A plaintiff may prove employment discrimination by direct, statistical or circumstantial evidence. Id. Here, plaintiff has offered no direct or statistical evidence of sex discrimination. In her affidavit 7., she maintains that she was required to teach more classes than her male counterparts who she asserted were Acker and Doron. According to the affidavit, Acker worked 10 hours and Doron worked only 9 hours, while plaintiff worked 11 hours during the Fall 1985 semester. Plaintiff, in that affidavit, also asserts that Acker should not be given a "lifetime appointment" as senior "Hebrew teacher 8. and that she has received "titles from Hebrew University and N.Y.U." and did "course work at J.T.S." 9. Thus it appears that her claim would most likely be based on circumstantial evidence.

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6. Plaintiff has filed a second suit, 89 CV 3053 apparently alleging these later discriminatory acts.

7. Plaintiff submitted two personal

In proving a Title VII claim by circumstantial evidence, a plaintiff has the initial burden of establishing a prima facie case of discrimination, if the plaintiff meets the burden, then the defendant must articulate a legitimate reason for its action. If the defendant establishes a legitimate reason, the plaintiff has the burden of showing that reason is pretextual. Sorlucco v. New York City Police Department, 888 F. 2d 4, (2d Cir. 1989).

To defeat a defendant's motion for summary judgment, a plaintiff must at least establish a prima facie case of discrimination. Defendant points out that Doron was not plaintiff's male counterpart because plaintiff was a lecturer and Doron was an assistant Professor; and since Assistant Professors are expected to perform outside research, they are required to teach less hours. 10. Defendant also maintains that plaintiff was not qualified for any position higher than lecturer because she did not have her Phd. While plaintiff's assertion that she had titles from Hebrew University and New York University and did course work at J.T.S. may be an

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affidavits; the one referred to her received docket #16, the other concerned for the most part the college's lockout.

8. Plaintiff's Affidavit 25.

9. Plaintiff's affidavit 27.

indication that she disagrees with the criteria for moving above lecturer, she has set forth no specific facts from which it might be inferred that the criteria were being applied in a manner which was discriminatory to women or that she actually had a Phd. but was denied an assistant professorship because of gender and thus no inference may be drawn from her affidavits that she was discriminatorily required to work more hours than Doron.

In the case of Acker, while he was plaintiff's male counterpart in that he was also a lecturer in Hebrew and he taught only 10 hours a week during the Fall 1985 semester, he (as defendant points out) served as the administrator of the Hebrew department and thus received 4 hours release time for performing administrative duties. 11. Therefore, Acker worked 14 hours per week during the Fall 1985 semester and plaintiff only worked 11 per week. In her affidavit, plaintiff asserts that Acker should not have been given a lifetime appointment to senior Hebrew teacher. Whether plaintiff is actually referring to Acker being head of the department is unclear; at any rate, no facts are set forth in the affidavit from

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10. Locker Affidavit for Summary Judgment Motion, 14 (referring to Exhibit A to Locker Affidavit in opposition to Plaintiff's motion for TRO.)

which it may be inferred that Acker was not the department head or that as department head he should not be given four hours of release time or that plaintiff was discriminatorily denied the department head position. Thus, plaintiff has failed to establish a prima facie case that she was required to work more hours than her male counterpart and hence there is no question of whether defendant had a legitimate business reason or based the decision on whether plaintiff was female.

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11. Locker affidavit in opposition to plaintiff's TRO, 14; while 14 states 3 hours, Locker's affidavit in support of Summary Judgment states that was an inadvertent mistake and 4 hours is typical and this is corroborated by Exhibit P. Further, even if it were only 3 hours, Acker's 13 hours would be more than plaintiff's 11. It should also be noted that Exhibit P indicates plaintiff only taught 10 hours during the Fall of 1985 rather than 11 as plaintiff maintains.

CONCLUSION

Defendant's cross motion for summary judgment is granted; plaintiff's claims in her 1987 complaint must be and hereby are dismissed. Defendant's motion to enjoin plaintiffs motions for future TROs is denied; however, sanctions may be imposed should plaintiff bring future frivolous TRO motions.

SO ORDERED.

/s/ THOMAS C. PLATT

Chief Judge, U.S.D.C.

Dated: Uniondale, NY
February 26, 1990

APPENDIX D

UNITED STATES DIRTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

MIRIAM SOFFER,

Plaintiff,

-against-

QUEENS COLLEGE OF THE CITY UNIVERSITY OF NEW YORK,

Defendant.

----------X

FILED
By Clerk's Office
U.S. DISTRICT COURT EDNY
LONG ISLAND OFFICE
FEB 28 1990
ENTERED
3.2

JUDGMENT
CV 87 1695 (TCP)

A memorandum and order of Hon. Thomas C. Platt, Chief Judge, United States District Court, having filed on February 26, 1990, granting defendant's cross-motion for summary judgment, dismissing plaintiff's claims, denying defendant's motion to enjoin plaintiff's motions for future temporary restraining order, and finding that sanctions for temporary restraining order it it

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; that the complaint is dismissed; that the defendant's motion to enjoin plaintiff's motions for future temporary restraining order is denied; and that sanctions may be imposed should the plaintiff bring future frivolous motions for temporary restraining order.

ROBERT C.HEINEMANN
Clerk of the Court
By: /s/ Joseph Di Talia

JOSEPH DI TALIA
Deputy Clerk-in-Charge

Dated: Uniondale, New York
February 28, 1990

APPENDIX E

Copy of the last page of the Docket entries under the Eastern District court No. 87-CV-1695

Plaintiff	Defendant
Soffer	Queens College

Date	NR	Proceedings
1989		
11/1	52	By Chrein M. Order dtd 10/31/89 that no sanctions will be imposed against plaintiff. Magistrate is to be notified of Chief Judge Platt's decision in summary judgment motion returnable 11/17/89. Magistrate will schedule any required further proceedings upon receipt of this notification, filed. (ent'd 11/1/89) ss
		(SO ORDERED ON LETTER TO MAGISTRATE CHREIN FROM MIRIAM SOFFER)
11/13	53	Plaintiff's withdrawal of Motion for Summary Judgment pursuant to Rule 56 of Fed.R. Civ.P. dtd 12/12/88, filed. (ent'd 11/13//89) ss
11/13	54	Plaintiff's withdrawal of Motion for Summary Judgment pursuant to Rule 56(g) of Fed.R.Civ.P. dtd 12/12/89, filed. (ent'd 11/13/89) ss

Date	NR	Proceedings
11/17	--	Before TCP on 11/17/89 at 11.30 a.m. Case Called. Defendant present, plaintiff appears pro se. Motion argued. Decision reserved. ss
11/21	55	Copy of letter to Miriam Soffer from Marilyn T. Trautfield dtd 11/14/89 regarding withdrawal of Summary Judgment, filed. (ent'd 11/21/89) ss
1990		
02-26	56	MEMORANDUM AND ORDER by PLATT, Ch. J., dtd 02-26-90 that deft's cross motion for summary judgment be granted; pltfs claims in 1987 complaint are dismissed deft's motion to enjoin pltfs motions for future TRO's is denied, however, sanctions may be imposed should pltf bring future frivolous TRO motions. c/m eod 2-27-90
02-28	57	CLERK'S JUDGMENT dtd 02-28-90 that pltf take nothing of deft; that the complaint is dismissed; that deft's motion to enjoin pltfs motion for future temporary restraining order is denied; and that sanctions may be imposed should the pltf bring future frivolous motions for temporary

Date	NR	Proceedings
		restraining order. c/m, eod 03-02-90 gmh
03-05	58	LETTER dtd 02-21-90 to Southern District Court of NY from State of NY, re: requests time to answer complaint until 05-08-90, eod 03-14-90. gmh
03-30	59	NOTICE OF APPEAL by pro se pltf, from judgment dtd 02-28-90, clerk to serve copies; appellant paid docket fee $105.00 rect.117866, cert. copy of docket and copy of notice sent to COFA eod 04-02-90. gmh

APPENDIX F
CONSTITUTIONAL PROVISIONS, FEDERAL RULES OF APPELLATE PROCEDURE, AND SECOND CIRCUIT COURT RULES INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or, in the Militia, when in actual service in time of War or public danger, nor be deprived of life, liberty, or property without due process of law."

FEDERAL RULES OF APPELLATE PROCEDURE APPEARING ON "APPEALS TO THE SECOND CIRCUIT, 6TH EDITION"

RULE 10

RECORD ON APPEAl

(a) **Composition on the Record on Appeal.** The Original papers and exhibits filed in the district court, the transcript of proceedings if any, and a certified copy of the docket entries prepared by the clerk of the district court, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

RULE 26
COMPUTATION AND EXTENSION OF TIME

(b) **Enlargement of Time.**

"The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any]act, or may permit an act to be done after the expiration of such time..."

RULE 27

MOTIONS

(b) **Determination of Motions for Procedural Orders.**

Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural orders including any motions under Rule 26(b) may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the Clerk. A party adversely affected by such motion may by application to the court request consideration, vacation or modification of such action.

(c) Power of a Single Judge to Entertain Motions.

In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief under which under

these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that a motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

RULES OF THE SECOND CIRCUIT

0.18. **Entry of Orders by the Clerk**

7. Orders dismissing appeals in all cases where a brief for the appellant has not been filed within nine months of the docketing of the appeal and no stipulation extending the time for such filing has been filed.

27. **MOTIONS.**

(b) **Motions to be heard at Regular Sessions of the Court.**

Motions seeking substantive relief will normally be determined by a panel conducting a regular session of the court. These include, without limitation motions seeking bail pending appeal [see Rule 9(b)]; dismissal or summary affirmance, including summary enforcement of an agency order; stay or certificate of probable cause [see Rule 22]; leave to proceed in forma pauperis [see Rule 24] except when a certificate of probable cause has been granted by the district court or counsel has been assigned under 18 U.S.C., Section

Section 3006A; and assignment of counsel in cases not within subsection (e). Except as provided in subdivision (c) of this Rule, such motions will normally be noticed for a Tuesday when the court is in session, and the court will hear oral argument from any party desiring this..."

RULE 34
ORAL ARGUMENT

(a) The clerk shall add an appeal to the general calendar as soon as appellant's brief has been filed with him pursuant to these rules, except ...(2) that after the first Monday in April in any term, no case except a criminal case shall be added to the general calendar for that term unless the court or a judge upon motion shall so order, and (3) The Notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instructions from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.